United Nations A/HRC/37/NGO/49

General Assembly

Distr.: General
6 February 2018

English and Spanish only

Human Rights Council
Thirty-seventh session
26 February-23 March 2018
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written statement* submitted by the International Commission of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[31 January 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.18-01739(E)
1801739

Please recycle

Transitional justice and prevention: the obstacle of impunity

The joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser of the Secretary-General on the Prevention of Genocide, has as its welcome focus, the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law.

The International Commission of Jurists (ICJ) remains deeply concerned by continuing impunity for gross human rights violations in many parts of the world, which undermines the potential for transiational justice to contribute to prevention. It urges the relevant governments to take concrete action to ensure that transitional justice mechanisms and outcomes can fulfil their potential to help prevent recurrences in the future.

Peru: pardon and "right of grace" to former President Fujimori

One example is the pardon and "right of grace" granted in December 2017 by the President of Peru to former President Alberto Fujimori, for gross violations of human rights and other crimes1. The ICJ considers that the content and scope of these measures constitute a violation by Peru of its obligations under international law.

The pardon and "right of grace" granted to former President Alberto Fujimori annul the execution of the 2009 Supreme Court ruling, which sentenced Fujimori to 25 years in prison for gross human rights violations. In addition, these measures exempt former President Fujimori from several criminal proceedings currently underway and prevent further investigations against the former president for several cases of gross human rights violations, such as the Pativilca massacre and the forced sterilization of around 300 thousand women.

These measures undermine the rule of law and constitute an attack on the integrity of the judiciary, as well as an attempt to maintain impunity for the crimes against humanity and gross violations of human rights committed in Peru during the presidential administration of Alberto Fujimori between 1990 and 2000. In addition, by preventing criminal proceedings and investigations for gross violations of human rights, currently in progress, these measures deny victims and their families the rights to an effective remedy, truth and reparation, leaving them in a state of helplessness.

Likewise, the pardon and "right of grace" granted to former President Fujimori demonstrate flagrant disrespect for the judgments of the Inter-American Court of Human Rights and recommendations of UN human rights treaty bodies. Indeed, in its judgments concerning the cases of Barrios Altos and La Cantuta, the Inter-American Court reminded Peru that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."2 For its part, in 2000, the Human Rights Committee urged Peru "to refrain from adopting a new amnesty act."3.

The ICJ recalls that under international law - both treaty based and customary - crimes against humanity and gross violations of human rights cannot be the subject of amnesties, pardons or similar measures that prevent these crimes from being investigated, prosecuted and punished with penalties proportional to the seriousness of the illicit acts.

The ICJ also recalls that, under international law, the fact that the perpetrator of these crimes has acted as Head of State does not exempt the person from criminal responsibility or constitute a ground for the reduction of the sentence or a

---

[1] Supreme Resolution No. 281-2017-JUS of December 24, 2017

[2] Case of Barrios Altos v. Peru (Merits), Judgment of March 14, 2001, Series C No. 75, para. 41. See also, Case of La Cantuta v. Peru (Merits, Reparations and Costs), Judgment of November 29, 2006, Series C No. 162, para. 152.

[3] "Concluding observations by the Human Rights Committee: Peru", CCPR/CO/70/PER, 15 November 2000, para. 9.

mitigating circumstance. In this regard, it is worth remembering that the Human Rights Council has stressed that the rule of law requires "that no individual or public or private institution is above the law."[4]

The ICJ urges the Government of Peru to nullify the pardon and "right of grace" granted to former President Fujimori, and to refrain from similar acts in the future.

Nepal: transitional justice mechanisms ineffective

A further example comes from Nepal, where more than ten years after Nepal's decade-long conflict, as in the years preceding the civil war, political expediency has trumped calls for justice and accountability. There has been near absolute impunity for those responsible for serious crimes under international law.

Transitional justice mechanisms in Nepal – the Truth and Reconciliation Commission (TRC) and Commission on Investigation of Disappeared Persons (CoID) - have fallen short of international standards, both in constitution and operation, despite the repeated reinforcement of such standards by the Supreme Court of Nepal.

The Commissions have deeply flawed mandates - which, among other problems, allow the Commissions to recommend amnesties for gross human rights violations. The non-consultative and opaque approach of the Commissions has also created distrust with all major stakeholders including conflict victims and members of civil society, who remain suspicious of the transitional justice process.[5]

As of December 2017, the TRC had received 60,298 complaints and the CoID had received 3093 complaints.[6] Of these complaints, investigations have been initiated in only in a handful of cases, suggesting that these institutions have neither the capacity nor the political will to respond effectively to victims' demands. On 20 January 2018, the President approved an Ordinance to extend the mandate of both institutions without addressing any underlying problems, including the need for amendment of the laws governing their mandates and working procedures as had been directed by the Supreme Court.[7]

Court orders and the recommendations of the National Human Rights Commission (NHRC) remain largely unimplemented. According to a report commissioned by the ICJ and National Judicial Academy in 2016, 55.18 per cent of Supreme Court and Appellate Court orders on transitional justice are unimplemented.[8] The NHRC has reported that a mere 14 per cent report of its recommendations have been fully implemented during the last 10 years.[9]

Despite the well-documented failures of the many *ad hoc* commissions of inquiry (COI),[10] the Government continues to form CoIs to investigate cases of ongoing human rights violations, and continues the practice of withholding their conclusions from the public. Most notably, on 18 September 2016, a CoI was formed to investigate the protest in *Terai-Madhesh*, during which 66 persons including 10 security personnel and three minors were killed. The commission submitted its report to Prime Minister on 15 December 2017. However, the report has yet to be made public, despite pressure from civil society, and without any legitimate justification.[11]

---

[4] Resolution 19/36 "Human rights, democracy and the rule of law" of 23 March 2012, par. 16.

[5] The TRC and CoID were established in Nepal on February 10, 2015 with a two year mandate, extended for one more year on February 9, 2017.

[6] Data received from the TRC and CoID in December 2017.

[7] Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2071, volume 12.

[8] Study Report on Execution Status of the Supreme Court and Appellate Court Orders: judgment relating to Transitional Justice, National Judicial Academy (NJA) and International Commission of Jurists (ICJ), 2016.

[9] Ten Years of Comprehensive Peace Agreement: Human Rights Situation, a brief report, National Human Rights Commission, Nepal, 20 November 2016.

[10] Commission of inquiry in Nepal: Denying Remedy, Entrenching Impunity, ICJ 2012, available at https://www.icj.org/wp-content/uploads/2012/06/Nepal-Commissions-of-Inquiry-thematic-report-2012.pdf

[11] THRD Alliance, http://www.thrda.org/thrd-alliance-calls-make-public-inquiry-commissions-report-terai-killings.

The Government continues to flout Supreme Court orders directing it to enact domestic legislation to criminalize serious crimes in accordance with international standards.

While the ICJ welcomes provisions of the recently enacted Criminal Code that will criminalize, torture, enforced disappearance, and genocide (effective from August 2018),[12] the definitions of these crimes fall short of international standards. Other problems remain unaddressed; for instance, the statute of limitation for rape (one year) acts to exclude victims of sexual and gender based violence occurring during the conflict from seeking a remedy in the courts.

The ICJ calls upon the Government of Nepal to:

a) Amend the TRC Act, 2014, in line with the Supreme Court ruling and international standards;

b) Take measures to ensure that any transitional justice process takes a consultative approach to addressing victim's concerns;

c) Make public the report of the CoI on the *Madhesh* Movement;

d) Criminalize serious crimes under international law including torture, enforced disappearance, and crime against humanity in conformity with international standards and with retroactive effect so as to address past human rights violations; and extend or remove the statute of limitations for rape.

[12] The criminal code, Penal Code, Criminal Procedural Code, Civil code and civil procedural code were endorsed by the Legislative – Parliament on August 9, 2017, approved by the President on October 16, 2017 and will come into force from September 17, 2018.